No. 99-598

Supreme Court, U.S.
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In The

Supreme Court of the United States

PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC COMPANY, LLC, a Delaware corporation; and SALMON CREEK CORPORATION, a Delaware corporation,

Petitioners,

v.

MARBLED MURRELET (*Brachyramphus marmoratus*); NORTHERN SPOTTED OWL (*Strix occidentallis caurina*); and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit's application in this case of uniform Supreme Court and appellate court precedent on fee awards in public interest cases provide any reason to grant a writ of certiorari?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, respondent Environmental Protection Information Center states that it has no parent companies, subsidiaries, or affiliates.

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I. INTRODUCTION

In its Petition for Writ of Certiorari, Pacific Lumber Company asks this Court to adopt a rule that plaintiffs in citizen suits to enforce the Endangered Species Act (and a host of similar federal environmental laws) are liable for defendants' attorneys' fees whenever a defendant obtains a favorable ruling on a previously undecided issue, which defendant then argues "furthers the purposes" of the statute. (Petition, pp. 1, 22.) Such a rule would chill citizen suits out of existence. This result is clearly inconsistent with the intent of Congress that citizen-plaintiffs are the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978), *quoting Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Similar to the civil rights statutes referenced in this Court's opinion in *Christianburg Garment Co. v. EEOC*, in enacting the Endangered Species Act, "Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

Pacific Lumber's Petition for Writ of Certiorari does not meet any of the criteria established by this Court in Supreme Court Rule 10 for granting certiorari. The decision of the Ninth Circuit Court of Appeal is not in conflict with the decision of any other United States court of appeal on the question presented by the petition. The Court of Appeal's decision does not "so far depart from the accepted and usual course of judicial proceedings . . . as to call for the exercise of this Court's supervisory power." (Rule 10(a).)

Nor does the decision below "decide an important question of federal law that has not been, but should be, settled by this Court" or decide "an important question in a way that conflicts with relevant decisions of this Court" (Rule 10(c).)

Pacific Lumber argues that "[u]ncertainty and conflict exists among the circuits and within the lower courts as to whether – outside of the civil rights arena – the *Christianburg* dual standard or the *Fogerty* rule of parity governs the award

of attorneys' fees to a prevailing defendant under a neutrally-worded fee-shifting statute." (Petition, p. 3.) In fact, this is not true. Pacific Lumber has not cited, and respondent has been unable to find, any federal district court or court of appeal decision that conflicts with the decision of the Ninth Circuit Court of Appeals in this case. On the contrary, the decision below is entirely consistent with numerous decisions of this Court and every decision by the Courts of Appeal and district courts which have applied the citizen suit fee shifting provisions of the ESA and similar federal statutes.

This Court should not expend its resources deciding the question presented here until it has been addressed by additional circuit courts of appeal, because other circuits may well add value to the analysis of the issue that will not be available to this Court at this time. Indeed, this Court recently denied certiorari in a petition presenting the identical issue under the Clean Water Act and the Comprehensive Environmental Response, Compensation and Liability Act. *Hecla Mining Company v. Washington Wilderness Coalition*, 119 S.Ct. 1140 (March 8, 1999).

II. STATEMENT OF THE CASE

Respondent Environmental Protection Information Center ("EPIC") is a California non-profit corporation dedicated to protecting wilderness, natural communities and biodiversity. In this case EPIC brought two claims under section 7 of the Endangered Species Act ("ESA") (16 U.S.C. § 1536) and one claim under section 9 of the ESA. (16 U.S.C. § 1538.) The first section 7 claim alleged that the U.S. Fish and Wildlife Service ("Service") engaged in "agency action" requiring formal consultation and preparation of a biological opinion as a result of opinions it provided to Pacific Lumber that the California Department of Forestry and Fire Protection ("CDF") relied upon to approve Pacific Lumber's logging plans. The first section 7 claim related to Pacific Lumber's plan to conduct salvage or "exemption" logging in virgin old-growth redwood forests occupied by the marbled murrelet, a

"threatened" seabird. The second section 7 claim related to eight timber harvest plans approved by CDF located in forests occupied by "threatened" spotted owls. EPIC's ESA § 9 claim alleged that Pacific Lumber's exemption logging plans would "take" marbled murrelet in violation of section 9 of the ESA.

In September 1995, EPIC filed the action and obtained a preliminary injunction on its first section 7 claim. The Ninth Circuit reversed the preliminary injunction in June 1996. *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) (*"Marbled Murrelet I"* at App. G).[1]

In March 1996, EPIC amended its complaint to allege its second section 7 claim and in April 1996 obtained a preliminary injunction on that claim. In February 1997, the Ninth Circuit reversed the second preliminary injunction. *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997) (*"Marbled Murrelet II"*).

These decisions by the Ninth Circuit affirmed the Service's existing, and long-standing, interpretation of the Act that section 7 does not require "formal consultation" every time a project proponent requests technical advice to avoid "take" of listed species.

As the case progressed, EPIC's ESA § 9 claim succeeded in causing Pacific Lumber to permanently abandon its plan to use helicopters to conduct the exemption logging. On September 1, 1995, Pacific Lumber notified CDF of its intent to commence operations and use helicopters after the breeding season in the old growth redwood areas occupied by murrelets. (Resp. App. J.) On March 8, 1996 the California Department of Fish and Game wrote to CDF that "helicopter yarding activities will likely disturb or damage known sites of threatened or endangered species" in violation of Forest Practice Rule 1038(b)(7) (Resp. App. K.) On March 22, 1996 U. S. Fish and Wildlife Service biologist Ken Hoffman testified in deposition that helicopter yarding in Pacific Lumber's old

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[1] "App." refers to Petitioner's appendix. "Resp. App." refers to Respondent's appendix submitted herewith.

growth redwood forests would cause a "take" of murrelets in violation of section 9 of the ESA. (Resp. App. L.) Then on July 9, 1996 Pacific Lumber's counsel first informed plaintiffs (during the deposition of Pacific Lumber biologist Sal Chinnici) that, in order to remove the issue from this litigation, Pacific Lumber would not use helicopters in its exemption logging plans. (Resp. App. M.)

Thus even though EPIC elected not to seek its attorneys' fees in this case, EPIC could have done so on these facts. A fee award is "appropriate" when a plaintiff in an ESA citizen suit has at least partially prevailed and substantially contributed to the goals of the Act. *Ruckelshaus v. Sierra*, 463 U.S. 680, 682-684 (1983) (applying Clean Water Act fee shifting provision); *Carson-Truckee Water Conserv. Dist. v. Sec'y of the Interior*, 748 F.2d 523 (9th Cir. 1984). Here, EPIC prevailed because this lawsuit was a "catalyst" for Pacific Lumber's decision to abandon its helicopter logging plans, which afforded EPIC some of the relief it sought. *Stivers v. Pierce*, 71 F.3d 732, 751-752 (9th Cir. 1995). EPIC's success also substantially contributed to the ESA's goal of preventing "take" of marbled murrelets that would have occurred if Pacific Lumber had used helicopters.

After the District Court dissolved the preliminary injunction against the exemption harvests based on section 7 of the ESA and after Pacific Lumber agreed not to use helicopters for those harvests, EPIC sought a temporary restraining order against the exemption harvests on ESA § 9 grounds, arguing that Pacific Lumber's tractor logging would likely cause "take" of marbled murrelets. (Resp. App. N.) EPIC asserted that the removal of standing trees in areas occupied by murrelets (i.e., all of the old growth redwood forests remaining on Pacific Lumber's land) would "harm" the murrelet (as defined at 50 C.F.R. § 17.3); and that standing trees would be removed either by Pacific Lumber obtaining the approval of the Service to do so or through the inadvertent, but routine, damage to standing trees that occurs when tractors are used to remove down logs. (Resp. App. N.)

The District Court denied the motion. With respect to removing standing trees, the Court relied on Pacific Lumber resource manager Thomas Herman's declaration under penalty of perjury in which Pacific Lumber promised to implement a series of murrelet protection measures designed by the Service and enforced by the state agencies, which included a commitment not to remove standing trees without agency approval. (Resp. App. N. p. 45.) Regarding the destruction of standing trees from removing down logs, the District Court found that EPIC's "evidence . . . consists of conditional facts that are dependent upon other conditional facts." (Resp. App. N, 51:17-19.) Significantly, however, the Court noted that "EPIC's arguments and their declarations have been set forth in good faith and in a professional manner." (Resp. App. N, 51:21-24.)

Then EPIC's prediction that Pacific Lumber's removal of "down" logs would destroy standing trees (and thereby "harm" murrelets) came shockingly true in the first week of Pacific Lumber's operations. CDF issued a Notice of Violation charging Pacific Lumber with violating Forest Practice Rule 1038(b)(7), which provides that "no known sites of rare, threatened or endangered plants or animals will be disturbed, threatened or damaged." (Resp. App. O.) When the District Court convened a hearing on October 22, 1996 to investigate the matter further, CDF inspectors Hugh Scanlon and John Marshall testified that Pacific Lumber violated Rule 1038(b)(7) by knocking over and damaging a number of standing trees that reached into the forest canopy in the course of removing down logs. (Resp. App. P, pp. 19-23, 91-93). Nevertheless, the District Court again denied EPIC's TRO request.

Pacific Lumber's fee motion in the District Court sought to recover its fees for its defense of both EPIC's ESA § 7 and § 9 claims. Regarding, the Section 7 claims, Pacific Lumber conceded they were not frivolous and raised "an issue of first impression." (App. C, p. 25a, n. 12.) Therefore, the Ninth

Circuit, in the opinion below, only evaluated Pacific Lumber's claim for fees for its defense of the section 9 claim under the *Christianburg* standard. (App. A, p. 9a.) Pacific Lumber also conceded that its defense of the section 9 claims did not contribute substantially to the goals of the ESA. (Resp. App. Q, 12:10-15.)

III. ARGUMENT

A. THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI BECAUSE THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER EPIC'S CLAIMS UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT.

Pacific Lumber's fee motion and the question presented in its Petition are based solely on the attorney fee provision of the ESA. Since the ESA does not confer subject matter jurisdiction over EPIC's section 7 claims, the court does not have jurisdiction to award fees attributable to those claims.

1. The District Court Held That It Lacked Subject Matter Jurisdiction Over Plaintiffs' ESA § 7 Claims.

The Ninth Circuit held that neither the written advice the Service provided to Pacific Lumber regarding its exemption logging plans, nor the Service's concurrence that was essential to state approval of the logging plans constituted "agency action" under section 7. *Marbled Murrelet I, supra*, App. G at 82a-83a; *Marbled Murrelet II, supra*, App. E at 44a-45a. In light of the Ninth Circuit's opinions, the District Court granted the Service's and Pacific Lumber's motions to dismiss under Rule 12(b)(1), stating that the absence of agency action "compels the conclusion that the court lacks subject-matter jurisdiction over Plaintiffs' claims." (App. D, p. 41a, n. 6.)

2. The ESA Does Not Confer Jurisdiction to Award Attorney Fees Where There Is No Jurisdiction Over the Underlying Claim.

The attorney fee provision of the ESA permits awards of fees and costs, whenever appropriate, in "any suit brought pursuant to" the ESA citizen suit provision. 16 U.S.C § 1540(g)(4). Here, respondent EPIC was unable to state a claim for federal question jurisdiction under section 7 of the ESA. In analogous cases where subject matter jurisdiction is lacking under a federal statute providing for awards of attorney fees and costs to a prevailing party, the Ninth Circuit and other circuit courts have held that the court has no jurisdiction to award attorney fees. See, *e.g.*, *Branson v. Nott*, 62 F.3d 287, 293 (9th Cir. 1994) (vacating award of attorney fees to prevailing defendant under 42 U.S.C. § 1988 for lack of jurisdiction); *Smith v. Brady*, 972 F.2d 1095, 1097 (9th Cir. 1992) (where no jurisdiction existed under Internal Revenue Code, attorney fees could not be awarded pursuant to the code); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990) (civil rights); *Amitts v. Amoco, Inc.*, 53 F.3d 690, 692 (5th Cir. 1995) (vacating award to defendant of over $600,000 in fees and costs for lack of federal jurisdiction); *W.G. ex rel. D.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994) (Disabilities Act) (concluding that "fee shifting provisions cannot themselves confer subject matter jurisdiction"); compare *Latch v. United States*, 842 F.2d 1031 (9th Cir. 1988) (vacating award of fees under Internal Revenue Code for lack of subject matter jurisdiction).

> As a general rule, if a district court has wrongfully exercised subject matter jurisdiction over a dispute, the appellate court must vacate the district court's decision, including any award of attorney's fees.

Id. at 1033 (citations omitted).[2] Here, the District Court likewise lacked jurisdiction over EPIC's ESA § 7 claims. Therefore, this Court should deny the petition for certiorari.

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[2] *Accord, Greater Detroit Resource Recovery Authority v. EPA*, 916 F.2d 317, 320 (6th Cir. 1990) (Under the Equal Access to Justice Act:

3. Since the District Court Lacked Jurisdiction Over EPIC's ESA § 7 Claims, Pacific Lumber Did Not Prevail On The Merits.

Even if the ESA fee provision provided an independent grant of jurisdiction to award fees to Pacific Lumber in the absence of subject matter jurisdiction, such an award is improper here because the District Court's lack of subject matter jurisdiction means that Pacific Lumber is not a "prevailing party" for purposes of a fee award. *Branson v. Nott*, *supra*, 62 F.3d at 293, *citing*, *inter alia*, *Keene*, 908 F.2d at 298 ("Where a complaint has been dismissed for lack of subject matter jurisdiction, the 'defendant has not "prevailed" over the plaintiff on any issue central to the merits of the litigation.' ") Since it did not "prevail," Pacific Lumber cannot recover its attorneys' fees. *Ruckelshaus v. Sierra Club*, *supra*.

B. THE ENDANGERED SPECIES ACT DOES NOT AUTHORIZE PACIFIC LUMBER'S FEE MOTION OR ITS PETITION FOR CERTIORARI.

Pacific Lumber argues that it is entitled to fees because it prevailed on its appeals of the two preliminary injunction orders entered on EPIC's ESA § 7 claims, and the appellate rulings allegedly "furthered the purposes of the statute" (Petition at 2.)[3] There is an additional threshold legal reason that this Court should not grant certiorari.

"Unless the statute under which a party seeks attorney's fees contains an independent grant of jurisdiction, an appellate court must vacate an award of attorney's fees if the district court did not have subject matter jurisdiction over the litigation"); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995); *Finn v. United States*, 856 F.2d 606 (4th Cir. 1988); *Clifton v. Heckler*, 755 F.2d 1138 (5th Cir. 1985).

[3] Pacific Lumber waived any argument that its defense of EPIC's ESA § 9 claims "contributed substantially" to the goals of the ESA. (Resp. App. Q, 12:10-15.)

EPIC's ESA § 7 claims were not, and could not have been, brought under the ESA citizen suit provision (at 16 U.S.C. § 1540(g)(1)). This Court has held that the citizen suit provision of the Act does not authorize ESA § 7 claims against the Secretary of the Interior, which must be brought under the Administrative Procedures Act (5 U.S.C. § 701 *et seq.*). *Bennett v. Spear*, 520 U.S. 154, 172-174 (1997). Since the ESA fee shifting provision at 16 U.S.C. § 1540(g)(4) applies, by its terms, only to suits under § 1540(g)(1), and EPIC's ESA § 7 claims were not brought under that section, there is no statutory basis for Pacific Lumber's claim for attorneys' fees for its defense of the ESA § 7 claims. See also, *Earth Island Institute v. Albright*, 147 F.3d 1352, 1357 (1998) (reversing an award of attorneys' fees to an environmental plaintiff in an ESA case, citing the holding in *Bennett v. Spear* that 16 U.S.C. § 1540(g)(1) does not authorize citizen suits contesting "the Secretary's maladministration of the Act"). Since there is no statutory authority for Pacific Lumber's fee motion, this Court should not consider the question presented in the petition for certiorari.

C. PACIFIC LUMBER'S PROPOSED STANDARD FOR AWARDING FEES UNDER THE ENDANGERED SPECIES ACT TO PREVAILING DEFENDANTS IS UNPRECEDENTED AND INCORRECT.

The ESA authorizes courts to award attorney fees "to any party, whenever the court determines such an award is appropriate." 16 U.S.C. § 1540(g)(4). In citizen suits under similar federal environmental laws, the Ninth Circuit, drawing directly from this Court's decision in *Christianburg Garment Co. v. EEOC*, *supra*, awards fees to prevailing defendants only if the defendants establish that the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995) (applying similar fee provisions in the Clean Water Act (33

U.S.C. § 1356(d)) and the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6972(e)). *See also Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (applying same standard under 42 U.S.C. § 1988). This standard is not unique to the Ninth Circuit. *See infra* Part D (listing cases). This standard, moreover, is consistent with the plain language and Congressional objectives of the ESA.

Pacific Lumber's petition, without citing any disagreement among the circuits of the federal court of appeals, or any conflict with previous opinions of this Court, asks the Court to consider adopting a new standard. Pacific Lumber argues that because the fee shifting provision of the ESA (and other similar statutes) do not provide any guidance to the courts as to when fee shifting is "appropriate," plaintiffs and defendants must be treated equally. Under this view, the absence of statutory guidance would mean that courts would have unlimited discretion, with no judicially created standards to constrain the exercise of that discretion. In addition, Pacific Lumber's proposed standard would allow courts to award fees against meritorious but non-prevailing citizen plaintiffs. Such a standard would undermine the very reason that Congress authorized citizen suits in the ESA and other federal environmental protection statutes – to *encourage* citizen enforcement of those Acts.[4]

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[4] Although Pacific Lumber refers ominously to an increase in the number of citizen enforcement actions filed since the ESA was adopted in 1972, Pacific Lumber fails to disclose what percentage have been resolved against plaintiffs. An increase in the number of meritorious citizen enforcement actions provides benefits Congress intended. *See* D. Hodas, *Enforcement of Environmental Law In a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?* 54 Md. L. Rev. 1552 (1995) ("only extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool."). Congress has recently acknowledged: "Citizen suits are a proven enforcement tool. They operate as Congress intended – to both spur and

1. Petitioner's Assertion That the ESA Fee Provision Requires Treating Plaintiffs and Defendants Equally Is Incorrect.

Pacific Lumber argues that because the ESA fee shifting provision does not distinguish between plaintiffs and defendants, judicial decisions which place limits on the Court's exercise of discretion by restricting fee awards against plaintiffs to cases that are frivolous or unreasonable, contradict the statute. But courts routinely develop rules that bound the exercise of statutorily authorized discretion. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) ("Although the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits."). In fact, that is what this Court did in *Christianburg*, *supra*, with respect to Title VII. And in this case, Congress specifically included the phrase "when appropriate" in the statutory language to guide the exercise of discretion in awarding fees.[5] Pacific Lumber's "plain meaning" analysis overlooks both this statutory guide to judicial discretion and

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supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains." S. Rep. No. 99-50, at 28 (1985). Even the article cited by Pacific Lumber acknowledges that "[p]rivate enforcement can play a critical role in ensuring compliance with these statutes. It can spur appropriate governmental action and can ensure that the laws are enforced against significant violators that may otherwise evade detection." Ross McFarlane and Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, Nat. Resources & Env't 20, 25. More enforcement means more compliance with the ESA and greater environmental protection. The fact that petitioners would prefer less enforcement of the ESA is not a reason for granting a writ of certiorari.

[5] In fact, to remove limits on judicial discretion would promote inconsistent and *ad hoc* standards of the type that Pacific Lumber purportedly seeks to avoid.

this Court's historic role in guiding the exercise of discretion to award fees.

2. The Term "When Appropriate" Should Be Interpreted In Light of the Purposes of the Endangered Species Act.

As this Court recognized in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) the term "when appropriate" does not conclusively explain when fees should be awarded. In the context of statutes that cast citizen plaintiffs in the role of "private attorneys general," this Court has already determined, in *Christianburg Garment Co. v. EEOC, supra*, that it is "appropriate" to impose a more stringent standard on prevailing defendants who seek fees, even when the statutory language does not on its face distinguish between prevailing parties, because such a rule furthers the purposes of the statute. The Ninth Circuit and the district court correctly applied this so-called "dual" standard (*see Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 520 (1994)) in denying Pacific Lumber's request for fees in this case.

The rationale for treating prevailing plaintiffs and prevailing defendants differently for the purpose of awarding fees in citizen suits is clearly explained in *Christianburg*. *Christianburg* interpreted the fee provision in Title VII, which contains language authorizing courts to award fees to the "prevailing party."[6] Like Pacific Lumber in this case, the prevailing defendant in *Christianburg* argued that the "plain meaning" of Title VII's fee provision did not allow courts to treat prevailing plaintiffs and prevailing defendants differently for the purpose of awarding fees. The Court rejected that argument outright: "[T]he permissive and discretionary language of the statute does not even invite, let alone require,

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[6] Section 706(k) provides, "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs[.]" 42 U.S.C. § 2000e-5(k). The fee provisions of the ESA is virtually identical.

such a mechanical construction." 434 U.S. at 418. Rather than treating the parties similarly, the *Christianburg* court identified two "equitable considerations" that compelled a more lenient fee standard for prevailing civil rights plaintiffs, and a more difficult standard for prevailing defendants.

The first consideration is that the "plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " 434 U.S. at 418 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)). The second consideration is that when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. *Id.* To award fees against a good faith, but non-prevailing plaintiff, would *discourage* private enforcement and undermine the very purpose of citizen enforcement provisions. *See* 434 U.S. at 422 (assessing fees against meritorious but non-prevailing plaintiff "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.") Based on these policy considerations, and backed by legislative history indicating that Congress intended to encourage citizen enforcement and deter frivolous suits, the Court in *Christianburg* held that lower courts could award fees to a prevailing Title VII defendant only upon finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421.

This "dual" standard was reaffirmed in *Fogerty v. Fantasy, Inc., supra. Fogerty* involved a fee decision governed by § 505 of the Copyright Act, which contains fee-shifting language similar to the civil rights statutes. *See* 17 U.S.C. § 505. Unlike the instant case, the circuits at the time of *Fogerty* were divided over whether a prevailing defendant seeking fees under the Copyright Act should be required to establish that the plaintiff's infringement claim was frivolous or vexatious. 510 U.S. at 521 n.8. After reviewing the goals and policies of the Copyright Act, this Court declined to apply the "dual" standard, because the "equitable considerations" of the

Copyright Act are not the same as the civil rights statutes. Nor did this Court find Congressional intent in the Copyright Act to encourage plaintiffs *in particular* to bring meritorious infringement claims. Rather, this Court found the Copyright Act's goal of "stimulat[ing] artistic creativity for the general public good," is furthered by vigorous claims *and* defenses. *Fogerty*, 510 U.S. at 527 ("defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.").

The Court, however, took the opportunity to expressly reaffirm that the "dual" standard is appropriate under other statutes, including public interest statutes with fee shifting language virtually identical to the fee shifting language of the Copyright Act. *Fogerty, supra*, 510 U.S. at 522-23.

Unlike the Copyright Act, both of the "equitable considerations" that persuaded the Court to adopt a dual standard in *Christianburg* are present in ESA citizen enforcement actions. The citizen suit provisions in the ESA, like the citizen suit provisions in the civil rights statutes, were enacted to encourage citizen participation in enforcing the important Congressional objective of conserving endangered species. In addition, when a court awards fees to a prevailing plaintiff in an environmental citizen suit, as noted in *Christianburg*, *supra*, it is awarding fees *against* a violator of federal law.

Citizen suits provide a secondary benefit that should be included in the analysis of equitable considerations. Citizen suits increase enforcement actions, thereby insuring more uniform compliance, so that those who comply with the ESA are not at a competitive disadvantage with those who do not comply. Citizen enforcement "can provide the states, through dedicated and persistent litigation, with the level playing field that the federal government cannot provide on its own." D. Hodas, *Enforcement In a Triangular Federal System*, *supra*, 52 Md. L. Rev. at 1574-1578.

The second equitable factor in *Christianburg* also applies when interpreting the phrase "whenever . . . appropriate" in

the ESA. When plaintiffs prevail, it means that the fees that are awarded will be paid by an entity that has been found to be in violation of the statute. As in *Christianburg*, this factor supports treating prevailing plaintiffs differently than prevailing defendants. Unlike imposing fees on violators of the law, awarding fees against meritorious but non-prevailing plaintiffs would punish entities for having invested years of time and effort in performing a civic duty (enforcement of the law) with no expectation of monetary compensation.

This Court's decision in *Bennett v. Spear* does not support Pacific Lumber's argument that plaintiffs and defendants must be treated equally for all purposes under the ESA. In fact, in *Bennett* this Court followed the principles stated in *Fogerty* in the context of the ESA, finding that the "obvious purpose" of the ESA citizen suit provision "is to encourage enforcement by so-called private attorneys general." *Bennett*, 117 S.Ct. at 1162. This finding by the Court brings the ESA squarely within the rationale of *Christianburg*. In both the ESA and the Civil Rights Act, Congress wanted to encourage plaintiffs, acting as private attorneys general, to sue. Therefore, the dual standard should apply to the ESA.

Like virtually all of the cases cited by Pacific Lumber, *Bennett* involves *plaintiffs* under the Act. Specifically, the question decided in *Bennett* was whether plaintiffs with purely economic interests have standing to sue under the citizens' suit provision of the ESA. The question of whether certain *plaintiffs have standing* has no bearing on the standard *defendants* must meet to obtain fees under the ESA.[7] By broadening the category of citizens who can sue under the

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[7] As the Supreme Court noted in *Bennett*, to determine standing, "we look not to the terms of the ESA's citizen-suit provision, but to the substantive provisions of the ESA, the alleged violations of which serve as the gravamen of the complaint." 117 S.Ct. at 1167. Thus, standing was determined by examining the "zone of interests" which the statute protects, not by the term "person" in the statute.

Act, the Supreme Court in *Bennett* plainly intended to *encourage citizens' suits* — not deter them. To adopt the standard proposed by Pacific Lumber would do exactly that. In short, *Bennett v. Spear* does not endorse an "evenhanded" standard for awarding fees.[8]

Pacific Lumber also relies on *Carson-Truckee Water Conserv. Dist. v. Sec'y of the Interior*, 748 F.2d 523 (9th Cir. 1984), which the Ninth Circuit overruled in the opinion below. In *Carson-Truckee*, a water district sued the Department of the Interior to force it to release water impounded to recover endangered fish species. The Pyramid Lake Paiute Tribe intervened as a defendant to oppose the release of more water. The intervenor and the Interior Department successfully defended the suit by relying on the department's obligations under section 7(a)(1) of the ESA to conserve listed fish species. The plaintiff did not make any claim for relief under the ESA, instead the intervenor made affirmative claims under the ESA to prevent additional water discharges. Also, the intervenor participated in the litigation voluntarily, and was not alleged to be in violation of the statute. Therefore, the intervenor was more like an ESA plaintiff, because it was the intervenor who plead claims for relief under the ESA.

This factual context of the case is not apparent from reading the decision denying attorneys' fees reported at *Carson-Truckee Water Conserv. Dist. v. Sec'y of the Interior*, 748 F.2d 523, but is apparent from the Ninth Circuit's decision on the merits reported at *Carson-Truckee Water Conserv. Dist. v. Sec'y of the Interior*, 741 F.2d 257 (1984). Given this procedural context, the Court's treatment of the intervenor like an ESA plaintiff for purposes of a fee award is consistent with

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[8] This Court's recognition in *Bennett*, that an economically motivated plaintiff in ESA litigation "may . . . recover their litigation costs" under 16 U.S.C. § 1540(g)(4) (520 U.S. at 161) says nothing about the standard that applies to such a party. Both *Christianburg* and the opinion below contemplate that an economically motivated defendant "may recover" fees where the plaintiff's case is "frivolous, unreasonable or without foundation."

the Ninth Circuit's decisions in *Razore v. Tulalip Tribes* and the opinion below.

Carson-Truckee is not controlling, or even persuasive, for several more reasons. *Carson-Truckee* was an ESA § 7 case. As discussed above, the ESA fee provision at § 1540(g)(4), by its terms, only applies in citizen suits under § 1540(g)(1). In *Bennett v. Spear* this Court held that the citizen suit provision of the Act does not authorize section 7 claims against the Secretary of the Interior, which must be brought under the APA. Therefore, there was no statutory authority under the ESA for a fee award to the intervenor in *Carson-Truckee*.[9]

In the instant case, plaintiffs established that Pacific Lumber's plan to use helicopters would "take" marbled murrelets and EPIC's prediction that the removal of downed trees would destroy standing trees in marbled murrelet habitat came true as soon as Pacific Lumber began logging. To order plaintiffs to pay defendants attorney fees under such circumstances would not be "appropriate," and would certainly deter other citizens from bringing the sorts of enforcement actions that Congress so clearly intended. Indeed, adopting the rule proposed by Pacific Lumber would encourage all partially successful defendants to seek their attorneys' fees, if for no other reason than to sap the resources of their adversaries.

3. The Evolution of Statutory Language In Federal Environmental Citizen Suit Provisions Confirms That Congress Approves of the Dual Standard For Fees In Citizen Suits.

Pacific Lumber argues that because the Pipeline Safety Act of 1992 and several other recent statutes explicitly bifurcate the fee standard for prevailing plaintiffs and prevailing

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[9] This issue was raised in *Carson-Truckee* but the Ninth Circuit declined to rule on it. *Id.* 748 F.2d at 526.

defendants, 49 U.S.C. § 60121(b), the absence of similar language in the ESA means by negative implication that Congress intended a single standard to be applied to both parties under the ESA. (Petition at 18, n. 19.) The more explicit bifurcation in recent legislation, however, merely indicates congressional approval of the dual standard developed by courts in interpreting the "whenever . . . appropriate" language of the ESA and other public interest statutes.

The citizen suit and fee-shifting provisions were added to the Pipeline Safety Act in 1976. Congress acknowledged that the purpose of the fee-shifting provisions was to "insure effective enforcement and compliance" with the Act. S. Rep. No. 852, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Adm. News 4673. In imposing a more stringent fee standard upon prevailing defendants, Congress specifically noted that this provision was consistent with *United States Steel v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974). *United States Steel*, in turn, was a case interpreting § 706(k) of the civil rights statutes. Although § 706(k), like the provisions of the ESA, does not expressly identify a fee standard for prevailing defendants, the *United States Steel* court applied a "dual" standard based upon the same reasoning later applied by this Court in *Christianburg*, and declined to award fees to a prevailing defendant.[10] By incorporating the judicially developed dual standard into the statutory language of the later Pipeline Safety Act, Congress accepted, rather than rejected, the dual standard approach to interpreting the "whenever . . . appropriate" language found both in civil rights statutes and in the federal environmental statutes like the ESA.

There is further evidence that Congress has accepted the dual standard approach to fee applications under federal environmental statutes. Congress has twice amended the Clean

[10] Four years later this Court affirmed this type of fee analysis in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

Water Act (33 U.S.C. § 1251 *et seq.*) since the "whenever ... appropriate" language was adopted in the citizen suit provision of the CWA. *See* Act of December 27, 1977, Pub. L. No. 95-217, 91 Stat. 1566; Act of February 4, 1987, Pub. L. No. 100-4, 101 Stat. 7. At the time of those amendments, courts were applying the dual standard to fee awards, and the only case to have addressed the dual standard in the specific context of a CWA citizen suit had held that the dual standards was appropriate in such cases. *See, Consolidated Edison Co. v. Realty Investment Co.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (defendants may be awarded fees under CAA only if case was "objectively frivolous."). It is well established that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Had Congress disagreed with the judicial interpretations being applied to the "where appropriate" language of the civil rights laws or the CWA, it could have corrected that interpretation. Since it did not, the ratification principle indicates that Congress agrees with the dual standard developed by this Court, and its application to a broad range of public interest statutes with common fee-shifting language.

4. The Legislative History of the ESA Supports the Court's Dual Standard Approach.

Pacific Lumber argues that "[t]he legislative history of the fee shifting provision of the ESA reveals no congressional intent to favor plaintiffs over defendants." (Petition at 18.) This is not true. The legislative history of federal environmental statutes, including the ESA, demonstrates that the words "any party" in the fee-shifting provision were not intended to permit defendants to seek fees except where the suit is objectively meritless or harassing. *See Ruckelshaus, supra*, 463 U.S. at 693, n.13 (CAA legislative history materials stating that courts could award costs and attorneys' fees against citizens that bring "frivolous and harassing actions".)

Indeed the ESA's legislative history conclusively demonstrates that Congress intended the dual standard to apply to the ESA's fee provision. When Congress enacted the ESA citizen suit provision, the House Report states that its language is parallel to that in the Marine Protection, Research and Sanctuaries Act, and is "to be interpreted in the same fashion." H. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973). The Senate Committee Report on the MPRSA explicitly adopted the dual standard for fee awards, and said that prevailing plaintiffs could receive fees in meritorious suits, while prevailing defendants could only receive fees if the purpose of the suit was harassment. (1972 U.S. Code Cong. & Admin. News 4234, 4249-50). This legislative history is cited at *Village of Kaktovik v. Watt*, 689 F.2d 222, 225, n.14 (D.C. Cir. 1982). No cases or legislative history imply that defendants are entitled to receive statutory attorney fees in an environmental suit under any other standard.

Similarly, the legislative history of other federal environmental statutes shows that Congress intended to use fee awards to encourage citizen suits, and limit awards to defendants to cases in which suits were found to be frivolous or harassing — the very standard that has been consistently applied by courts, including this Court, in cases where Congress has authorized citizens to enforce public laws.

The first environmental statute to authorize citizens to sue and to recover fees and costs when they prevail was the Clean Air Act of 1970 ("CAA"). The CAA provides that fees can be awarded to "any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d). This provision has served as a model for every other environmental citizen suit provision that has come after it. As this Court noted in *Ruckleshaus v. Sierra Club*, *supra*, 463 U.S. at 682, n. 1, "the interpretation of 'appropriate' in § 307(f) controls construction of the term in [sixteen other environmental] statutes [including the CWA]." The Senate Report on the CAA explains the legislative understanding of when an award of fees to a defendant might be "appropriate:"

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

S. Rep. No. 1196, 91st Cong., 2d Sess. 36-39 (1970) (quoted in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 725 (D.C. Cir. 1975).

The next environmental law adopted by Congress with a fee shifting citizen suit provision was the Federal Water Pollution Control Act Amendments of 1972 (later renamed the Clean Water Act ("CWA")). The fee shifting language of the CWA was virtually identical to that of the Clean Air Act. And as with the Clean Air Act, Congress made clear that the "whenever . . . appropriate" language was intended to encourage citizen enforcers, and provide for awards to defendants only when cases were "frivolous." *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971) ("The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing.").

In 1976 Congress enacted the Toxic Substance Control Act, and included a provision for citizen enforcement modeled after similar provisions in the prior environmental statutes noted above. S. Rep. No. 698, 94th Cong., 2nd Sess. 9 (1976). It provides that:

> The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such decision, may include an award of costs of suit and reasonable

> fees for attorneys and expert witnesses if the court determines that such award is appropriate.

15 U.S.C. § 2618(d).

The legislative history of this provision unequivocally states that the standard for recovery of attorney fees by defendant is different, and more stringent, than the standard for plaintiffs:

> In exceptional circumstances, fees and costs might also be awarded to defendants where they must 'defend against unreasonable, frivolous, meritless or vexatious actions . . . " *United States Steel Corp. v. United States*, 385 F. Supp. 346, 348 (W.D. Pa. 1974). Where plaintiff's proceeding is brought in good faith or on the advice of competent counsel, fees and costs would ordinarily be denied to a prevailing defendant. *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd 468 F.2d 951 (5th Cir. 1972). The standard for awarding fees and costs to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk, to the average citizen of bringing suit under this section would be so great it would discourage such suits.

122 Cong. Rec. 8300 (1976) (statement of Sen. Tunney).

In 1977 Congress enacted the Surface Mining Control and Reclamation Act, which includes a citizen suit provision modeled after similar provisions in the Clean Air Act and other environmental statutes. It provides that:

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

30 U.S.C. § 1270(d).

In both the House and Senate reports accompanying the legislation, Congress showed clear support for the dual standard for attorney fee recovery, stating that prevailing defendants could only recover attorney fees where plaintiffs' suit is brought in "bad faith." The Senate Report states:

> The provision is not meant to deter citizens from bringing good faith actions to insure the Act is being enforced by the prospect of having to pay their opponent's counsel fees should they lose. *Under this section, a defendant can be awarded reasonable fees from the citizen only if he can show that the citizen brought the action in 'bad faith.'* This is similar to other citizen suits provisions involving the award of attorney's fees. [Emphasis added]

S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977). Similarly, the House Report states:

> Thus, it is the Committee's intention that this provision be construed consistently with the general principle that an award may be made to a defendant only if the plaintiff has instituted the action solely 'to harass or embarrass' the defendant. *United States Steel Corp. v. United States*, 519 F.2d 354, 364, (3d Cir. 1975). If the plaintiff is 'motivated by malice and vindictiveness' then the court may award counsel fees to the prevailing defendant. *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). *Thus, if the action is not brought in bad faith, such fees should not be allowed.* See *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975); see also *Richardson v. Hotel Corp. of America*, 332 F. Supp. 519 (E.D. La. 1971); affirmed without published opinion, 468 F.2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes. [Emphasis added]

H. Rep. No. 218, 95th Cong., 1st Sess. 90 (1977).

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), adopted in 1986, provides for an award of fees to "the prevailing or substantially prevailing party whenever the court determines such award is appropriate." The Senate Report accompanying CERCLA states "As with similar provisions in other environmental citizens suit laws, this will encourage private enforcement by allowing such awards to private plaintiffs where the court determines the bringing of the action was in the public interest, while discouraging frivolous suits by allowing costs to be awarded to defendants in appropriate cases." S. Rep. No. 11, 99th Cong., 1st Sess. 63 (1985).

Congress has extensive experience in drafting citizen suit legislation, and is well aware of the dual standard that courts, including this Court, have applied in cases where citizens have been authorized to enforce public laws. Congress has consistently expressed approval of that standard. Far from supporting Pacific Lumber's argument, the legislative history of environmental legislation supports the Ninth Circuit's application of the *Christianburg* standard to Pacific Lumber's fee application in this case.

5. The Court Has Previously Recognized That It Is Appropriate to Apply Civil Rights Fee Jurisprudence To Fee Issues In Environmental Cases.

Pacific Lumber argues that the *Christianburg* standard should not be applied to environmental cases because of the "unique status of civil rights citizen suits" and there is "no parallel to the national commitment to deal with discrimination." (Petition at 19.) The "differences" cited by Pacific Lumber, however, are not differences at all.

Indeed, this Court has previously recognized that "Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, *supra*, 437

U.S. at 174. There can be no higher priority than the "highest" priority; thus Congress viewed endangered species protection on a par with ending racial discrimination.

This Court has also recognized the similarities advanced by environmental and civil rights statutes and the similarity in methods used to achieve those objectives: "Given the common purpose of both [Clean Air Act] § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 560 (1986). *See also Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1982) (interpreting fee provisions of section 1988 and of the 1964 Civil Rights Act similarly).

The legislative history of the citizen suit provision of the Clean Air Act, on which the ESA provisions are based, establishes that Congress was influenced by the success of citizen enforcement of the Civil Rights Act and used it as a model for the Clean Air Act citizen suit provision:

> Our experience in areas of massive unlawful racial discrimination . . . tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that rights cannot be violated with impunity. Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individual affected by, or concerned about pollution in his life, the power to stop them through the legal process.

Statement of Attorney General Ramsey Clark in support of citizen suit provision of Clean Air Act of 1970, reprinted in *Natural Resources Defense Council, Inc. v. Train*, *supra*, 510 F.2d at 728 (D.C. Cir. 1975). This Court recognized as early as *Ruckleshaus v. Sierra Club*, *supra*, 463 U.S. at 682 n.1 (1983), that "the interpretation of 'appropriate' in § 307(f) [of

the Clean Air Act] controls construction of the term in [sixteen other environmental statutes, including the Endangered Species Act]." In both civil rights and environmental cases, Congress sought to enlist the aid of citizens in enforcing that law and preventing violations. Pacific Lumber cites no authority for the proposition that Congress was less concerned with violations of environmental laws than it was with violations of civil rights laws, and Respondent is unaware of any such authority.

Pacific Lumber's argument that environmental citizen suits "support, not supplant" government agency enforcement authority (Petition at 20) is beside the point. Congress meant to encourage citizen enforcement in both cases, and the dual standard adopted in *Christianburg* is necessary to achieve Congressional purposes in both cases.[11] Perhaps more importantly, since plaintiffs in environmental citizen suits do not stand to gain financially from acting as private attorneys general, they will be unwilling to risk prosecuting even meritorious cases if faced with the risk of paying a defendant's fees when, as in this case, they succeed in same respects but lose an issue of first impression in the Court of Appeal. The interpretation urged by Pacific Lumber would "render[ ] the [citizen suit] statute useless, in all or nearly all instances, to effect the very object it was originally enacted to accomplish." *Keene Corp. v. United States*, 508 U.S. 200, 213-14 (1993).[12]

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[11] Pacific Lumber points to this Court's discussion of the sixty-day notice requirement and "diligent prosecution" defenses of the Clean Water Act in *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) as evidence that "Congress [did not] manifest an intent to favor plaintiffs over defendants." (Petition at 20.) But again, this observation does not indicate that Congress was less concerned with enforcement of environmental laws than civil rights laws. Assuming the sixty-day notice and diligent prosecution provisions are satisfied, the analysis is the same—did Congress intend to encourage citizen enforcement? The answer is yes in both environmental and civil rights cases.

[12] Pacific Lumber points out that nine specified environmental organizations are relatively well funded, and are not "impecunious." But

D. THERE IS NO DISCREPANCY AMONG THE LOWER COURTS FOR THIS COURT TO CLARIFY.

Pacific Lumber's statement that there is "confusion" in the lower courts regarding which standard to apply is simply inaccurate. Pacific Lumber is attempting to create confusion where there is none. In reality, lower courts are uniformly applying the "dual" standard when making fee determinations in environmental citizen suits. Notwithstanding the Ninth Circuit's now overruled decision in *Carson-Truckee Water Conserv. Dist. v. Sec'y of the Interior*, *supra*, Respondent is unaware of any decision in which a court has applied the "contributed substantially" standard to a fee application by a defendant alleged to be in violation of a federal environmental protection statute. There is simply no unsettled law for this Court to clarify.

Sierra Club v. Shell Oil Co., 817 F.2d 1169 (5th Cir. 1987), the only case cited by Pacific Lumber in which a prevailing defendant was awarded fees, is not to the contrary. That case contains no discussion of the standard for a fee award to a defendant. The *facts* of the case indicate that the court likely used the "dual" standard and, upon finding the plaintiffs' claims to be frivolous, awarded fees to the prevailing defendant. Also, the opinion indicates that "costs" were

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the fact that nine organizations have substantial assets says nothing about the hundreds of local, underfunded environmental organizations, such as EPIC, and individuals who make use of the citizen suit provisions of federal environmental laws, who are indeed impecunious. Moreover, whether a particular plaintiff is impecunious is a relative term. None of the nine well funded organizations identified have anywhere near the assets of a company like Pacific Lumber. The article cited by Pacific Lumber acknowledges the obvious: that environmental groups "cannot begin to match industry political action committees in political cash." George Hager, *Lobbyists: For Industry and Opponents, a Showdown is in the Air*, 48 Cong. Q. Wkly. Rep. 145, 145 (1990).

awarded, but is ambiguous as to whether attorneys' fees were awarded. 817 F.2d at 1176.

In addition to the Ninth Circuit and district court opinions below, every other court in the country which has considered a fee request by a prevailing defendant in a citizen suit has applied the same stringent standard and denied a fee award. One district court applied a "frivolous or bad faith" standard to an ESA citizen suit and denied defendant's fee request. *National Audubon Society v. Babbitt*, Case No. CV 94-0105-GT (S.D. Cal., Dec. 15, 1994). Five district courts have applied a "frivolous" or "meritless" standard and have uniformly denied requests by prevailing defendants for fees and costs in citizen suits under the Clean Water Act. *Atlantic States Legal Foundation v. Arrow Transportation Co.*, Civil No. 95-147-HA (D. Ore., Jan. 27, 1997); *Atlantic States Legal Foundation v. Onondaga Department of Drainage and Sanitation*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995); *Washington Trout v. Scab Rock Feeders*, 823 F. Supp. 819, 821 (E.D. Wash. 1993); *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 64 (W.D. Mich. 1989); *Sierra Club v. SCM Corp.*, Civ-82-1076T (W.D. N.Y. 1985). A district court has applied a "frivolous or harassing" standard and denied a request for a prevailing defendant in a citizen suit under the Clean Air Act. *Consolidated Edison Co. v. Realty Investment Assoc., supra*. Five courts have denied fees to prevailing defendants in RCRA citizen suits based on findings that the suits were not frivolous. *Razore v. Tulalip Tribes, supra*; *Orchard Lane Road Association v. Pete Lien & Sons, Inc.*, 16 F.3d 416, 1994 U.S. App. LEXIS 1508, 24 ELR 20804 (10th Cir. 1994); *Palumbo v. Waste Technologies Industries*, 37 F.3d 1495, 1994 U.S. App. LEXIS 29355 (4th Cir. 1994); *Truck Components, Inc. v. Beatrice Co.*, 1996 U.S. App. LEXIS 9946 (N.D. Ill., July 15, 1996); *Environmental Compliance Oversight Corp. v. SmithKline Beecham Corp.*, 1994 WL 675297 (E.D. Pa., Nov. 21, 1994).

E. GRANTING THE PETITION FOR WRIT OF CERTIORARI WILL NOT AFFECT THE RIGHTS OF THE PARTIES AND WOULD BE AN ADVISORY OPINION.

The District Court in this case took the efficient course of action and decided Pacific Lumber's fee motion under both possible standards, finding that plaintiffs' claims were not frivolous, and that Pacific Lumber did not "contribute substantially" to the goals of the ESA:

> However, the result Pacific Lumber sought, furthered and obtained was the validity of its permits so that it could proceed in its planned harvests. The court cannot conclude that Pacific Lumber's pursuit of conducting a timber harvest serves the public interest in implementing the ESA's goals of preserving endangered and threatened species. Because Pacific Lumber sought advice and consultation from the federal agency before the litigation and will, presumably, continue to do so after this litigation, the court cannot find that Pacific Lumber acted in such a way as to substantially contribute to the goals of species preservation and an award of fees for its part in the litigation would be inappropriate. The court will not grant Pacific Lumber attorneys' fees under the ESA's fee shifting provision.

(App. C, p. 24a.) Given the evidence, cited above in Part II, that Pacific Lumber's logging actually harmed occupied marbled murrelet habitat, the District Court's finding is unsurprising, and certainly not an abuse of discretion.

Pacific Lumber implies that because the Ninth Circuit based its ESA § 7 decisions, in part, on its policy view that a general rule requiring consultation would discourage communications that may ultimately benefit listed species, that its defense of those claims must have actually conferred some benefit on these species. But Pacific Lumber failed to produce any evidence that its discussions with the U.S. Fish and Wildlife Service in this case actually furthered the purposes of the ESA. Indeed, the only evidence on this question is that

Pacific Lumber's salvage logging conducted after the preliminary injunction was dissolved harmed marbled murrelets and their habitat.

In short, the fact that there may be policy reasons supporting the Ninth Circuit's holding that section 7 of the ESA does not require formal consultation when the Service gives advice to private landowners does not mean that the Court can presume that application of that rule in all circumstances will serve the goals of the ESA. If Pacific Lumber's proposed standard applies, evidence of "substantial contribution" is required and Pacific Lumber produced no such evidence. Therefore, this petition does not present a "live" controversy, because the District Court already decided that Pacific Lumber did not meet its own preferred standard for recovering fees.

IV. CONCLUSION

Pacific Lumber has presented no reason, much less any compelling reason, for this Court to revisit the well-established standard that prevailing defendants must show that citizen plaintiffs acted frivolously or unreasonably before such defendants may recover attorney fees under federal environmental statutes such as the Endangered Species Act. Respondent EPIC respectfully requests that the Court deny Pacific Lumber's petition for a writ of certiorari.

Respectfully submitted,

THOMAS N. LUPPI
Counsel of Record
Environmental Protection
Information Center
One Market Plaza
Steuart Tower, 16th Floor
San Francisco, CA 94105
(415) 777-5600
Counsel for Respondent
Environmental Protection
Information Center, Inc.

Dated: December 6, 1999

APPENDIX J

EXHIBIT 12

[LOGO]

THE PACIFIC LUMBER COMPANY

P.O. Box 37 – Scotia, Ca 95565 – (707) 764-2222

September 1, 1995

Ms. Lois Kaufman
Forest Practice Inspector
California Department of Forestry
and Fire Protection
Humboldt / Del Norte Ranger Unit
118 So. Fortuna Blvd.
Fortuna, CA 95540

Dear Ms. Kaufman:

RE: Operations Pursuant to 14 CCR 1038(b)

The Pacific Lumber Company (PL), acting itself as licensed timber operator or through independent subcontractors acting as licensed timber operator, is planning to commence operations on exemption notice 1-95-086HUM on behalf of Salmon Creek Corporation, the Landowner. As you recall, operations under this exemption notice have been subjected to consultation with USF&W and CDF&G regarding mitigation of impacts to certain species of wildlife listed under the State and/or Federal Endangered Species Acts. One of the limitations imposed limited the season of operation in certain timber types to a period between September 15 and April 1. PL intends to commence operations sometime shortly after September 15, 1995.

With agreement of the landowner and as a result of consultations required by law to assure protection of listed species, operations conducted under this exemption notice are limited by certain mitigations intended to assure that no "take" of listed species occurs. These limitations are documented in an exchange of correspondence between the wildlife agencies and PL beginning with a joint letter from the agencies to PL, dated April 12, 1995, followed by a letter from PL back to the agencies seeking clarification, dated May 3, 1995, and finally concluding with a clarification letter from the agencies to PL, dated July 18, 1995. All operations will be conducted in strict compliance with the terms of these letters and all applicable forest practice rules.

At the current time PL is planning operations utilizing both ground based conventional yarding systems and helicopter yarding systems. With regard to the latter, USF&W and CDF&G have clarified a statement in the April 12, 1995, letter by stating that any restriction on helicopter operations applies only *within the marbled murrelet breeding season*, which ends September 15 (July 18, 1995 letter, p. 3, item H). In conversation with Mr. Phil Detrich of USF&W, I specifically asked if helicopter yarding after the seasonal restriction had passed would be permitted, and he acknowledged that such operations were not prohibited (personal conversation with Phil Detrich).

Though not required by law, because of the sensitivity of this matter, I write to you at this early date to give your agency and the wildlife agencies copied with this letter notice of PL's intent to commence operations, providing adequate time for any pre-operation discussions or

inspections, and so that there is a clear understanding between the operator and the agencies. I ask that you or any other agency representative contact me regarding any discussion or inspections that any agency thinks appropriate prior to, during or after commencement of operations.

Sincerely,

THE PACIFIC LUMBER COMPANY
/s/ Thomas M. Herman
THOMAS M. HERMAN
Resource Manager

Encls.
cc: Phil Detrich, USF&W
Mark Stopher, CDF&G

APPENDIX K

EXHIBIT 19

Memorandum

March 8, 1996

To: Mr. Thomas P. Ospowich
Deputy Chief, Forest Practice
California Department of Forestry
and Fire Protection
Coast-Cascade Region, Resource Management
Post Office Box 670
Santa Rosa, California 95402

From: **Department of Fish and Game** Region 1
601 Locust Street, Redding, California 98001

Subject: Helicopter Yarding From Occupied [sic] Marbled Murrelet Habitat in Previously Unentered Old-Growth Redwood Stands

Following are the results of an evaluation performed by the Department of Fish and Game in response to proposed helicopter yarding of down logs from previously unentered old-growth stands. The subject stands are those owned by the Salmon Creek Corporation and The Pacific Lumber Company (PALCO) and the logging proposed is included under exemption notice 1-95-086HUM, and other exemptions. These comments apply only to those old-growth redwood stands which have been surveyed by PALCO (or their contractors) and where observations have been noted indicating that marbled murrelets (listed as endangered under the California Endangered Species Act) are present in these stands or that these stands are "occupied" by marbled murrelets. These comments are intended to supplement our letters

of April 12, 1995, and July 18, 1995, with respect to timber harvest exemption operations proposed by PALCO.

The Department is providing these comments to the Department of Forestry and Fire Protection (CDF) in application to California Forest Practice Rules: Section 1038(b) which specifies conditions under which timber harvest activities are exempt from the requirement for preparation of a timber harvest plan. Specifically, this evaluation pertains to the application of condition Section 1038(b)(7) which states, "No known sites or rare, threatened or endangered plants or animals will be disturbed, threatened or damaged."

The Department met with PALCO representatives on at least eight occasions during 1995 to discuss and/or field evaluate old-growth redwood stands where exemption logging either has occurred or is proposed. These dates include: January 13, February 22, March 9 and 22, April 19, May 3, August 30 and September 5. On several of these occasions the effort was specifically to evaluate old-growth redwood stands where exemption logging using a helicopter is proposed. During the field visits the stand's trees, canopy closure, topography and logs targeted for removal were inspected. We discussed the means by which a helicopter would remove downed logs, potential damage to the canopy and standing trees and procedures which might mitigate adverse impacts.

Department biologists have also recently observed several helicopter yarding operations on the El Dorado, Toiyabe and Six Rivers national forests. Helicopters such as the Chinook 234, Boeing 107 and Huey UH1S were observed removing logs from mixed conifer and Douglas

fir stands where selection/salvage and thinning harvest methods were utilized. While observing these helicopter yarding operations several concerns were noted relevant to the exemption logging proposed by PALCO. The principle [sic] concerns involve the effects of rotor wash on trees directly below and in the immediate vicinity. Another concern was that of direct damage to standing trees and canopy as logs are lifted and removed.

Specific observations include:

1. In all cases the tops of trees directly below and in the near proximity were whipped abruptly and continuously while the helicopter was lowering the tag line, the tag line was being attached to the cabled logs and while logs were being lifted.

2. Small branches, leaves, cones and debris from the canopy were blown to the ground as the helicopter hovered over each site and while logs were lifted. Some of the falling debris was generated when individual logs, while being hoisted, struck and broke off portions (branches and bark) of standing trees. Some of the debris (small branches, needles, duff) appeared to be a direct result of the downward air movement from the helicopter rotor blowing debris out of the trees and/or forcing debris off the ground into the air.

3. In most instances the rotor wash appeared to penetrate the canopy, affect branches for the full length of the trees and disturb soil and debris on the ground under and near the hovering helicopter. This was observed with a tag line up to 250 feet in length.

These observations are of concern because murrelets principally nest in the upper one-third to one-half of dominant trees in the stand. Murrelets use natural structure and elements in the canopy for its nest and for

cryptic protection. These structures and elements include platforms such as debris piles and needle accumulations for nests, and small branches that function as screening and protective cover. During the observed helicopter operations these smaller, and apparently fragile elements in the canopy appeared to be mobilized by the rotor wash. These elements were also physically damaged by the logs being lifted up and through the remaining canopy. These impacts are likely to reduce the suitability of the stand for murrelets in subsequent nesting seasons.

It is apparent to the Department that helicopter yarding to remove downed logs from a relatively closed canopy, old-growth redwood stand has a high likelihood of disturbing and/or damaging some of the critical elements that make individual trees viable as a murrelet nest site. According to information provided by PALCO there may be several log removals from each acre and many hundreds in each occupied murrelet stand. The cumulative effect will likely be that many of the requisite nest elements for murrelets will be knocked out or blown out of the standing trees. If this occurs the ability of the stand to function for murrelet nesting will be substantively reduced. Therefore, the Department concludes that PALCO's proposed operation will, with a high degree of probability, disturb, threaten or damage known sites of threatened or endangered animals.

The Department's conclusion in this matter is based upon our assessment of available information on murrelet nesting requirements and observations of the effects of rotor wash and physical damage to standing trees. These effects are likely to disturb, threaten or damage essential habitat characteristics.

Although the described observations provide sufficient basis for reaching this conclusion, some site-specific uncertainty remains. The Department was not able to find and observe a helicopter yarding operation identical to that proposed by PALCO. In fact, helicopter pilots interviewed by the Department opined that there is no closely comparable precedent for the type of operation proposed by PALCO. In light of this, the Department is willing to participate with CDF and PALCO in further investigations to more definitively determine whether the subject proposal would likely disturb, threaten or damage known murrelet sites.

Absent a representative demonstration to the contrary, the Department's opinion is that the proposed helicopter yarding activities will likely disturb or damage known sites of threatened or endangered species.

If you wish to discuss this matter further, please contact Region 1 Environmental Services Supervisor Mr. Mark Stopher at (916) 225-2275 (CALNET 442-2275).

/s/ Mark Stopher
for Richard L. Elliott
Regional Manager

cc: see attached list

APPENDIX L

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARBLED MURRELET,
et al.,

Plaintiffs,

No. C-95-3261 LCB

vs.

BRUCE BABBITT, et al.,

Defendants.

Pages 1 through 98, inclusive.

DEPOSITION OF KENNETH HOFFMAN

March 22, 1996

VOLUME I

REPORTED BY:

ANNETTE M. ROCCA, CSR NO. 8067

CERTIFIED COPY

* * *

[p. 40] Q. Did you also have an opinion, at the August 30th meeting, as to whether the helicopter yarding operations, under the exemption 086, would be likely to "take" an endangered or threatened species?

And I use the word "take" in the sense of the Endangered Species Act?

A. I understand. We discussed it in terms of there being potential for "take."

Q. Did you have an opinion as to whether – I'm talking about you personally, did you have an opinion of your own as to whether it would be likely or very likely to "take"?

A. Yes, I did.

MR. KEMP: Object to the form of the question, it's compound.

MR. LIPPE: Let me rephrase it.

Q. Did you have an opinion as to whether the helicopter yarding operations of exemption 086 would be likely to "take" an endangered or threatened species?

A. Yes, I did.

Q. And what was your opinion?

A. That it would be likely to "take."

Q. And which threatened or endangered

* * *

[p. 46] Was your opinion that helicopter yarding would be likely to "take" marbled murrelets an opinion directed only to helicopter operations that were conducted within the marbled murrelet breeding season, or was your opinion broader than that?

A. My opinion was that at any time during the breeding season or not, that helicopter use as proposed would result in "take" of marbled murrelets.

Q. Was your opinion that helicopter use would be likely to "take" marbled murrelets restricted to helicopter use over murrelet nesting habitat or the surrounding one quarter mile buffer that is less than 500 feet above the treetops of the nearest old growth stand?

And that's a quote from page 3 of Exhibit 11, the July 18th letter, paragraph H.

A. Yes, but for a different reason than what this was written.

Q. Can you explain that to me?

A. This restriction refers to an avoidance of noise disturbances, disruption of the central breeding behaviors, and my concern is with actual habitat loss. I agreed with this, but my opinion on August 30th was not related to noise disturbances.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARBLED MURRELET, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, et al.,

Defendants.

----------//

No. C-95-3261 LCB

Pages 1 through 150, inclusive.

DEPOSITION OF SALVADOR JOHN CHINNICI

July 9, 1996

REPORTED BY:

ANNETTE M. ROCCA, CSR NO. 8067

CERTIFIED COPY

* * *

[p. 90] EXAMINATION BY MR. LIPPE (Resumed)

MR. LIPPE: Back on the record.

Q. Was there a meeting with CDF and Pacific Lumber and other agencies, possibly on June 27th, about helicopter yarding as part of exemption 086?

A. What year?

Q. '96.

A. I believe there was a meeting in Scotia, yes, but I did not attend.

Q. Do you know if Pacific Lumber is still intending to do helicopter yarding as part of exemption 086?

A. I don't know.

MR. KEMP: I can save you time on that.

MR. LIPPE: Okay.

MR. KEMP: Pacific Lumber takes the position that as long as CDF finds that helicopter yarding would be a violation of 1038, whatever it is, which is what CDF presently believes, PALCO will not nor attempt to helicopter log.

PALCO reserves the right to try to convince CDF and Fish and Game that helicopter logging would not be injurious to habitat. But [p. 91] until that takes place, there is some sort of demonstration and CDF concurs, PALCO will not attempt to helicopter log.

And further, just to get it out of this case, should PALCO decide to have some kind of attempt to convince CDF to change its mind, it will make a public statement to you to that effect.

MR. LIPPE: So if you don't mind me following up on that. Actually, I want to ask you a couple of questions, as long as we're doing this.

Does Pacific Lumber have plans now in the works to convince CDF that it won't harm these species.

MR. KEMP: No.

MR. LIPPE: Okay. Thank you. I appreciate that.

Q. What were you told about the nature of the exemption harvest operations to take place under 086, when you were asked about advice on how to avoid a take of murrelets?

A. To the best that I can recall, I was told that we would be interested in removing dead downed material, and maybe some dying material.

Q. Anything else, or is that it?

A. That's all I can remember.

APPENDIX N

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARBLED MURRELET (Brachyramphus Marmoratus); NORTHERN SPOTTED OWL (Strix occidentalis caurina); ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.	:	CIVIL ACTION NO. C-95-3261 LCB
v.	:	
BRUCE BABBITT, Secretary, Department of the Interior; JOHN TURNER, Director, United States Fish and Wildlife Service; MICHAEL SPEAR, Region 1 Director, United States Fish & Wildlife Service; U.S. FISH & WILDLIFE SERVICE, THE PACIFIC LUMBER COMPANY, a Delaware Corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware Corporation; SALMON CREEK CORPORATION; a Delaware Corporation	:	

Philadelphia, Pa.
October 2, 1996

BEFORE HON. LOUIS C. BECHTLE, CH. J. Emeritus

HEARING

* * *

[p. 40] MS. KOHLER: The appropriate person would be John Turner, who is Acting Director.

THE COURT: That happens. With regard to federal agencies, if the Court's ruling requires a substitution, that will be made. We note these remarks with affection and admiration, that she worked with the federal government.

EPIC asks the Court to enjoin the Lumber Companies from harvesting "dead, dying and diseased trees" on its 200,000 acre property in Humboldt County, California. The Lumber Companies have obtained "exemption notices" from the California Department of Forestry and Fire Protection, referred to as the CDF, to conduct such operations. The exemption notices at issue in this case, are No. 1-95EX-086 HUM. No. 1-94EX-1110 HUM, meaning Humbolt County and its replacement, that is the last exemption number 1-95-546 HUM and No. 1-94EX-1357 HUM, which was replaced in 1995 by 1-95 Ex-753 HUM. We will refer to these exemption notices and the timber operations relating to them as the "Exemption Harvests."

Specifically, EPIC contends that removing standing and fallen trees pursuant to the Exemption Harvest notices will cause a "take" of the Marbled [p. 41] Murrelet in violation of Section 9 of the Endangered Species Act, 16 United States Code, Section 1538(a), and regulations promulgated thereunder.

Section 9 of the Endangered Species Act does prohibit any person from "taking" and that we all know in this courtroom and those reading this understand it has a very special meaning. There has been a lot of litigation about it. There have been many appellate rulings by the Supreme Court. But, in any event, that section does prevent the "taking" within the United states of species of

wildlife listed as "endangered." See 16 United States Code, Section 1538(a)(a)(B). Federal regulations have applied this prohibition to species listed as "threatened." 50 Code of federal Regulations, 17.21(a), 17.31(a). Under the statute, the term "take" means "to harass, harm, pursue, hunt shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 50 United States Code, Section 1532 subsection (19). There has been a number of court decisions that have also expounded upon the statutory words and the regulations that have been enacted and applied by the Service to those statutory terms.

EPIC argues that logging under the [p. 42] Exemption Harvests notices will "harass" and "harm" the Marbled Murrelet. The Department of the Interior has defined these terms as follows.

Harass "means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but they are not limited to, breeding, feeding or sheltering." 50 Code of Federal Regulations 17.3.

That same regulation makes reference to harm "means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills injures [sic] wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

The United States Court of Appeals for the Ninth Circuit has held that a party is entitled to injunctive relief under section 9 if it proves a "reasonably certain threat of

imminent harm to a protected species." See Marbled Murrelet v. Babbitt, 83 F.3d 1060 at 1066 (9th Cir. 1966). Now the standard for temporary restraining order that applies here.

[p. 43] It is in accordance with the Ninth Circuit's precedent. In the Ninth Circuit, a party is entitled to preliminary injunctive relief when it demonstrates either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for trial, and the balance of hardships tips sharply in favor of the party seeking relief. Marbled Murrelet v. Babbitt, 83 F.3d 1068 at 1073.

In Endangered Species Act cases, the balance of hardships and the public interest tip heavily in favor of the endangered species. That's cited in the previous case, 83 F.3d, 1068. EPIC, to that extent, has satisfied its burden of proof and is entitled to a temporary restraining order – if it has raised sufficiently serious questions going to the merits of whether a section 9 violation will occur. If EPIC has raised no such serious questions, the Court must deny its motion.

The Court finds the following facts:

The Marbled Murrelet has its habitat in old-growth forests on the Lumber Companies' property. The bird nests in old-growth forests by laying a single egg on a large, flat surface. [p. 44] Murrelets rely on dense trees stands to form a "canopy" that provides cover to their potential nest platforms.

The Lumber Companies qualified for three "exemption notices" to harvest "dead, dying, and diseased trees" under California's timber harvesting regulations. Shortly thereafter, the United States Fish and Wildlife Service, which I refer to as the "Service" and CDF became concerned that the Exemption Harvests that would result from the notices might unlawfully cause a take of the Marbled Murrelet. To this end, they imposed conditions on the Lumber Companies' ability to conduct the Exemption Harvests. These conditions are set forth in the agencies' letters dated April 12th, 1995, and July 18th, 1995. Those letters are in evidence in this case, and to the extent that the record shows that they are not there, they are received into evidence to become part of the record in this case.

The Lumber Companies have agreed to comply with the conditions as they perform the Exemption Harvests, which collectively cover the entire range of the Lumber Companies' property. These conditions were additional to the requirements contained in California's Forest Practice Rules.

[p. 45] The Lumber Companies propose to harvest two broad categories of timber. The first category involves the cutting down of standing trees in virgin, old-growth forests and residual, old-growth forests. The second category involves the removal of down logs, that is, trees that have fallen and are on the ground.

As to standing trees in virgin, old-growth stands, the Court finds that the Lumber Companies, through its Vice President and Resource Manager, Thomas M. Herman, have materially represented to the Court, under penalty

of perjury, that they will not cut a single standing tree in such stands unless the Service and CDF determine, as set forth in those letters that are exhibits, there is a procedure in there to do that, that the harvest would not affect Murrelets or their habitat or interfere with other trees constituting suitable habitat for Murrelets. See the Herman declaration at paragraph four. The Court incorporates by reference that declaration, which is also received into evidence in this case. Indeed, the Court will receive into evidence all of the declarations that have been filed by both sides. We have – we had considerable argument about those yesterday and there's no question they [p. 46] – the Court is considering those as exhibits offered to the Court.

As the standing trees in residual old-growth stands, Mr. Herman has declared under oath that operations in such stands are subject to again the inquiry involving the Service and CDF. And this process is set forth in paragraph 6 to 9, inclusive, of his declaration.

In regard to down logs in all forest stands, the Lumber Companies may remove downed logs using existing roads and skid trails between September 15th and April 1st. Removal of such timber may not damage or cause the eventual removal of standing timber, that is in the process of carrying out those exemption certificates, harvesting operations, damaged, or eventual removal of standing timber is to be avoided and it is prohibited.

The issue before the Court, based upon these facts is whether EPIC has presented serious questions going to the merits of whether logging pursuant to the Exemption Harvests will cause a take of the Marbled Murrelet in

violation of Section 9 of the Endangered Species Act and its accompanying regulations.

[p. 47] First I will discuss the foresting of standing timber and then discuss the issue of yarding down timber.

In their joint letters of April 12th and July 18th, 1995, the Service and CDF imposed significant conditions on the Lumber Companies' ability to conduct the Exemption Harvests. The Court described these conditions a few moments ago.

The letters spell out in considerable detail the conditions that were required by the agencies as part of the exemption notice, if you will, consultation that they had with the Lumber Companies. The Lumber Companies must comply with these conditions or they may not harvest "dead, dying or diseased trees."

The Service and CDF will enforce the conditions and are required by law to do so. The agencies have sufficient resources and personnel to do so adequately. No persuasive evidence suggests that the agencies will not or cannot perform their duties.

If the Lumber Companies comply with the conditions, the Service and CDF have concluded that harvesting of "dead, dying and diseased trees" pursuant to the exemption will not cause a "take" of [p. 48] the Marbled Murrelet. EPIC has not provided sufficient evidence to convince the Court that such harvesting will probably cause a take.

For these reasons, EPIC has not raised a serious question concerning further proceedings on the issue of

whether harvesting standing timber pursuant to the Exemption Harvest notice will cause a "take" of the Marbled Murrelet in violation of Section 9 of the Endangered Species Act.

This finding does not close the book on the issue, however. The Court notes that the Lumber Companies, in a separate feature of this litigation, argued that the April 12th and July 18th letters are merely advice, and are not mandatory requirements. Indeed, they persuaded the Ninth Circuit that this was the case and their position here is to some extent contrary to that.

Today's ruling, therefore, will not be separated from the position the Lumber Companies presented to the Court by Mr. Herman's declaration and the Lumber Companies' counsel assurance of the same in the name of his clients. Both asserted that in accordance with the joint conditions imposed by the Service and CDF, the Lumber Companies will not cut any standing timber – either in virgin or [p. 49] residual old-growth stands – without an agency determination as set forth in Mr. Herman's declaration, which in turn relied upon the provisions of the letters that the Court has received into evidence, and has referred to earlier in its April 12th, 1995 and July 18th, 1995 letters.

The Court expects the Lumber Companies to follow these requirements strictly, as they represented that they will do. Indeed, the Court is expressly basing its ruling, based on the assumption that these representations will be honored.

Because Mr. Herman's declaration and counsel's courtroom assertions constitutes the linchpin of the

Court's ruling, the Court will require the Lumber Companies to notify the Court and EPIC in writing within 10 days of any change in their position on the issues embodied in those letters and Mr. Herman's declaration in paragraph six through nine inclusive. The Lumber Companies have agreed to comply with this notice demand, according to Mr. Kemp's representation to the Court today. That will allow EPIC ten days to consider what action, if any, it is entitled to or will decide to take in the event there is any change.

As to the yarding of down logs, the Lumber [p. 50] Companies, by their declarations, also have asserted to the Court that the removal of downed logs will be done without damage to standing trees causing premature death or destruction of large limbs that would be more than 100 feet above the ground. This is Mr. Herman's declaration in paragraph 15.

EPIC has submitted affidavits to support its theory that removing downed timber would probably cause damage to standing trees that could cause a take of the Marbled Murrelet. It argued that the dragging of fallen logs could kill or damage any trees or cause accumulated dead biotic material to fall from the canopy. There are a number of other arguments presented in the declarations by EPIC in this regard. EPIC reasons that this would reduce the number of platforms available for nesting and would probably eliminate hiding coverage and allow predators easier access to Marbled Murrelet nests. In that regard, a review of the characteristics and the behavior of these birds that has been received in other proceedings, tells us that these birds are very secretive. They fly very quickly and normally at night. They are very, apparently

very conscious, indeed their habits show they are aware of the need [p. 51] to avoid predation and they therefore seek a high canopy, they seek all of those things that make them fairly characterized as secretive, regarding their activities, especially involving breeding.

The evidence offered by EPIC, having to do with the damage to the habitat features associated with the Lumber Companies' property is set forth in the declaration of Robert J. Hrubes, H-R-U-B-E-S and Kim Nelson.

The Court finds that EPIC has not met its burden of proof on this issue. The Lumber Companies have stated that their yarding operations do not cause such damage. EPIC's declarations appear to contain, in fairness to their declarants, their best attempts at proving that the removal of down timber will adversely affect the Murrelet's behavioral patterns. The evidence, however, consists of conditional facts that are dependent upon other conditional facts. In most cases, in some, on an additional level of conditional facts and suppositions. The Court notes, however, that it believes that EPIC's arguments and their declarations have been set forth in good faith and in a professional manner, but that they simply do not support a finding that the removal of down [p. 52] timber in old-growth stands will probably cause collateral damage to standing trees, and that such damage will probably "significantly disrupt normal behavioral patterns" or "significantly impair essential behavioral patterns" of the Murrelet.

For this reason, EPIC has not raised a serious question warranting further proceedings on the issue of

whether harvesting fallen timber pursuant to the Exemption Notice Harvests will "harm" or "harass" the Marbled Murrelet and cause a "take" of the species in violation of Section 9 of the Endangered Species Act.

The Endangered Species Act, the regulations promulgated thereunder, and the case law interpreting those provisions have set forth a single, overarching principle; the courts must not take chances with the survival of a listed species. The Court has followed that congressional directive in the past, and it believes it is doing so here.

The Court finds that the exemption notices and the harvest that will result from them will not cause a "take" of the Marbled Murrelet as long as the Lumber Companies comply with the requirements of the Service and CDF, as the Court has referred to and as are included in the declarations and the [p. 53] letters that have been referred to and the representations made here in Court as to how they fit into the harvesting program of the Lumber Companies. If the Lumber Companies do not comply, the issue, of course, will be revisited by the Court. The Court intends as best it can to fulfill the congressional mandate and protect the Marbled Murrelet in this case and the traditional rights of all parties involved in this case as it would in respect to any endangered species that would be the topic of a claim such as has been made here.

For the reasons set forth above, the Court finds EPIC did not raise sufficiently serious questions going to the merits of whether the logging pursuant to the Exemption Notice Harvests will cause a "take" of the Marbled Murrelet in violation of Section 9 of the Endangered Species

Act and regulations promulgated thereunder. Accordingly, the Court will deny EPIC's motion for a temporary restraining order.

The Court will enter an appropriate order and counsel can receive a copy of this transcript from the court reporter. I will have Mr. Cirino give the parties a copy of the written order that I signed today. It is in keeping with a decision that [p. 54] the Court just read.

All right, counsel, I appreciate your coming to Philadelphia in regard to this matter. I won't go into that again other than we hope that it is not necessary to do that again, if it is, it would only be for good cause, which was the circumstance in this instance.

Anything further?

MR. LIPPE: One point of clarification, your Honor.

THE COURT: Yes.

MR. LIPPE: You indicated that Pacific Lumber was to give notice to the Court and EPIC within ten days of any change in operations or change in procedures. I wondered if you meant prior to or 10 days prior to any change?

THE COURT: It is implicit and Mr. Kemp is nodding he agrees, ten days – the opinion should be amended to say ten days prior notice to any change in the policies.

All right. Thank you for coming.

(The Court will adjourn at 5 of 12.

(Hearing adjourned at 11:55 a.m.)

[p. 55] I, SIDNEY ROTHSCHILD, being a United States Court Reporter, United States District Court, eastern District of Pennsylvania, do hereby certify that I was authorized to and did report in shorthand the above and foregoing proceedings, and that thereafter my shorthand notes were transcribed under my supervision, and that the foregoing pages contain a true and correct transcription of my shorthand notes taken therein.

Done and signed this 8th day of October, 1996, in the City of Philadelphia, County of Philadelphia, State of Pennsylvania.

/s/ Sidney S. Rothschild
SIDNEY S. ROTHSCHILD

U.S. Court Reporters
United States District Court
Eastern District of Pennsylvania

APPENDIX O

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NOT TO BE MAILED
NOT TO BE MAILED

Place this in the TMP file as the audit trail of computer generated form letters

Notice Number 1-96-784-EX/HUM
Inspection Letter dated October 09, 1996
Person contacted concerning
Timber Operation: Mike Niles
Inspection Date: October 09, 1996 - Inspection Number: 1

/s/ Illegible
signature

Hugh Scanlon, Forester I
Staff Forester, RPF # 2456
For J. R. Mc Collister, Unit Chief
Ca. Dept of Forestry & Fire Prot.
118 Fortuna Blvd. Fortuna, Ca 95540
(707) 725-4413

VIOLATIONS AND COMMENTS

ACTIVE INSPECTION - VIOLATION NOTED

In the Lawrence Creek/Bell Creek area, operations were being conducted in identified marbled murrelet habitat. Standing trees had been damaged within this area as

prohibited by the terms of the marbled murrelet consultation. These trees extended at least 50 to 80 feet into the canopy and are now on the ground. Failure to comply with the terms of the consultation is a VIOLATION of 14 CCR 1038(b)(7), which requires that exempt operations not result in damage, threat, or disturbance to known sites of rare, threatened or endangered plants or animals. A citation and stop work order have been issued for this violation.

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NOT TO BE MAILED

Place this in the TMP file as the audit trail of computer generated form letters

Notice Number 1-96-784-EX/HUM
Inspection Letter dated October 09, 1996
Person contacted concerning
Timber Operation: Mike Niles
Inspection Date: October 09, 1996 - Inspection Number: 1
List of Addresses

**********Violator**********

Scotia Pacific Holding Company P. O. Box 712 Scotia, CA 95565	The Pacific Lumber Company P. O. Box 37 Scotia, CA 95565

APPENDIX P

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE LOUIS C. BECHTLE, JUDGE

MARBLED MURRELET, ET AL.,	)	
	)	
PLAINTIFFS,	)	NO. C 95-3261 LCB
	)	
VS.	)	
	)	
BRUCE BABBITT, ET AL.,	)	
	)	
	)	
DEFENDANTS.	)	

SAN FRANCISCO, CALIFORNIA
TUESDAY, OCTOBER 22, 1996

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: LAW OFFICES OF THOMAS N. LIPPE
ONE MARKET PLAZA
STEUART STREET TOWER, 16TH FLOOR
SAN FRANCISCO, CA 94105
BY: THOMAS N. LIPPE, ESQ.

LAW OFFICES OF SHARON E. DUGGAN
1032 IRVING STREET, SUITE 218
SAN FRANCISCO, CA 94122
BY: SHARON E. DUGGAN, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: LEO T. MANKIEWICZ, CSR, RPR
OFFICIAL REPORTER, USDC

* * *

[p. 19] SCANLON - DIRECT\LIPPE

THE WITNESS: YES, YOUR HONOR.

MR. LIPPE: WE ACTUALLY HAVE ANOTHER MAP, WHICH IS A MUCH LARGER SCALE, WHICH MIGHT BE BETTER.

Q. IS THIS MAP EASIER FOR YOU TO DETERMINE WHERE IT WAS?

A. YES, IT IS.

THE COURT: IS THAT P-2, OR IS THAT SOMETHING ELSE?

MR. LIPPE: THAT WOULD BE P-3, IF . . . WE HAVE ANOTHER ONE COMING UP HERE.

(WHEREUPON, PLAINTIFFS' EXHIBIT P-3 WAS MARKED FOR IDENTIFICATION.)

THE COURT: WELL, LET'S DO THIS. LET'S GET THE MARKING A LITTLE LATER. LET'S GET TO WHAT HE SAW AND DID AND THOUGHT AND FELT AND WHAT HE TESTIFIED TO. WE CAN DO ALL THIS MARKING AT A RECESS.

BY MR. LIPPE:

Q. MR. -

THE COURT: THERE'S FIFTY-FIVE PEOPLE HERE.

BY MR. LIPPE:

Q. MR. SCANLON, WHAT WAS THE BASIS FOR YOUR ISSUING OF A NOTICE OF VIOLATION TO PACIFIC LUMBER COMPANY?

A. THE BASIS OF THE VIOLATION WAS A PERCEIVED VIOLATION OF CALIFORNIA CODE OF REGULATIONS TITLE 14, SECTION 1038(B), SUBSECTION (7).

Q. AND SO WHAT DID PACIFIC LUMBER ACTUALLY DO THAT YOU BELIEVE VIOLATED THAT RULE? DID THEY CUT DOWN TREES THAT WERE [P. 20] STANDING, FOR INSTANCE?

A. WHAT PACIFIC LUMBER IS ALLEGED TO HAVE DONE IN THAT CASE IS –

Q. CAN I JUST INTERRUPT YOU, PLEASE? I'M NOT ASKING WHAT THEY WERE ALLEGED TO HAVE DONE.

THE COURT: LET ME . . .

YOU NOTICED A VIOLATION, SOMETHING YOU SAW?

THE WITNESS: YES, YOUR HONOR.

THE COURT: WHAT DID YOU SEE?

THE WITNESS: WHAT I SAW WAS A NUMBER OF TREES THAT HAD BEEN KNOCKED DOWN, WHICH APPEARED TO BE CONTRARY TO THE TERMS OF THE CONSULTATION THAT WAS DONE FOR THAT EXEMPTION.

THE COURT: ALL RIGHT.

BY MR. LIPPE:

Q. HOW MANY TREES WERE KNOCKED DOWN?

A. WE OBSERVED APPROXIMATELY SEVEN OR SIX TREES THAT WERE KNOCKED DOWN OF ANY SUBSTANTIAL SIZE.

Q. OKAY. HOW MANY TREES TOTAL WERE KNOCKED DOWN, OF ANY SIZE WHATSOEVER?

A. I HAVE NO ESTIMATE OF THE NUMBER OF SEEDLINGS THAT WERE KNOCKED DOWN.

Q. OKAY. HOW TALL WERE – HOW TALL WAS THE TALLEST OF THE SIX OR SEVEN?

A. ESTIMATED AT 75 FEET.

Q. OKAY, HOW TALL WAS THE SHORTEST OF THAT GROUP?

[P. 21] A. APPROXIMATELY 30 FEET.

Q. AND DID YOU REACH AN OPINION AS TO WHETHER THOSE TREES WERE TREES THAT WERE IMPORTANT FOR THE MARBLED MURRELET, AS FAR AS ITS HABITAT IS CONCERNED?

MR. CARTER: OBJECTION, YOUR HONOR. I DON'T –

THE COURT: WELL, IF HE SAYS NO, IT'S NOT A PROBLEM, RIGHT?

DID YOU MAKE SOME DETERMINATION?

THE WITNESS: I DID NOT MAKE ANY SUCH DETERMINATION.

THE COURT: SEE? NOT A PROBLEM.

BY MR. LIPPE:

Q. DID SOMEONE ELSE MAKE A DETERMINATION AS TO WHETHER THE KNOCKING DOWN OF THOSE TREES WOULD ADVERSELY AFFECT THE MARBLED MURRELET?

A. I DON'T UNDERSTAND THE QUESTION.

THE COURT: WELL, LET'S JUST . . . YOU PERCEIVED THE VIOLATION, YOU SAW IT, AND YOU TOOK SOME STEP TO RECORD A VIOLATION SOMEWHERE. WHAT DID YOU DO?

THE WITNESS: WHAT WAS DONE IS A NOTICE OF VIOLATION WAS ISSUED TO THE COMPANY, AND A CITATION WAS ISSUED TO THE COMPANY.

THE COURT: OKAY, AND DID THAT VIOLATION HAVE ANYTHING TO DO WITH THE FINDING THAT THERE WAS AN ENDANGERMENT TO THE HABITAT FOR THE MARBLED MURRELET, AS FAR AS YOU KNOW?

THE WITNESS: I CAN'T SPEAK DIRECTLY TO THAT, YOUR [P. 22] HONOR.

THE COURT: DO I TAKE IT OUR VIEW IS THAT IT VIOLATED 14-1038(B)(7)?

THE WITNESS: YES.

THE COURT: MARBLED MURRELET OR NO MARBLED MURRELET, THAT'S WHAT IT VIOLATED.

THE WITNESS: YES, YOUR HONOR.

THE COURT: ALL RIGHT, GO AHEAD.

BY MR. LIPPE:

Q. NOW, WHY WAS KNOCKING DOWN OF THOSE STANDING TREES A VIOLATION IN YOUR VIEW AT THAT TIME?

A. UNDER THE TERMS OF THE CONSULTATION THAT HAD BEEN INCLUDED WITH THE EXEMPTION, STANDING TREES WERE NOT TO BE DAMAGED.

Q. AND IS IT STILL YOUR VIEW THAT THE KNOCKING DOWN OF STANDING TREES WOULD CONSTITUTE A VIOLATION?

A. YES, IT IS.

Q. WOULD THAT BE TRUE FOR STANDING TREES OF ANY SIZE?

A. NO, IT WOULD NOT.

Q. WHAT IS THE SIZE CRITERION THAT WOULD BE THE CUTOFF, IF YOU WILL?

A. THE CUTOFF, IN MY MIND, WOULD COME WITH TREES OF A HEIGHT WHERE YOU WERE REACHING INTO THE CANOPY, WOULD BE THE PRIMARY CONCERN.

YES.

THE COURT: WHAT'S YOUR UNDERSTANDING OF THAT RANGE OF HEIGHT, OR THAT HEIGHT?

[P. 23] THE WITNESS: I DON'T HAVE A DIRECT UNDERSTANDING OR A DIRECT FIGURE FOR THAT, YOUR HONOR.

THE COURT: OVER 20 FEET?

THE WITNESS: IT COULD. IT COULD BE OVER 30 FEET. IT COULD BE OVER A GREAT AREA, DEPENDING.

THE COURT: AND THERE IS SOMEONE IN YOUR DEPARTMENT THAT DOES HAVE THAT UNDERSTANDING?

THE WITNESS: THAT WOULD BE DONE IN CONSULTATION WITH THE DEPARTMENT OF FISH AND GAME.

THE COURT: ALL RIGHT.

BY MR. LIPPE:

Q. IS THERE ANY PLAN TO REACH THOSE KINDS OF DETERMINATIONS IN CONSULTATION WITH THE FISH AND WILDLIFE SERVICE AS WELL, OR IS IT SOLELY THE DEPARTMENT OF FISH AND GAME?

A. I HAVE NO KNOWLEDGE OF THAT.

Q. OKAY. HAS ANYTHING CHANGED, IN YOUR UNDERSTANDING, OF THE CONDITIONS THAT APPLY WITH RESPECT TO THE KINDS OF STANDING TREES THAT CAN BE KNOCKED DOWN WITHOUT CAUSING A VIOLATION, SINCE YOU ISSUED THE NOTICE OF VIOLATION OCTOBER 9TH?

A. NO, THAT HAS BEEN NO CHANGE, IN MY UNDERSTANDING.

Q. OKAY, SO IN YOUR UNDERSTANDING THE TREES THAT WERE KNOCKED DOWN OCTOBER 7TH, IF YOU SAW THAT HAPPEN TODAY, THAT WOULD BE A VIOLATION, IN YOUR VIEW?

A. YES, IT WOULD.

Q. OKAY. DO YOU HAVE AN UNDERSTANDING AS TO WHY CDF WITHDREW

* * *

[p. 91] MARSHALL - DIRECT\LIPPE

L-U-C-K-E, WHO'S ASSISTANT DEPUTY DIRECTOR FOR RESOURCE MANAGEMENT, WHO HAS INDICATED TO ME THAT HE'S BEEN IN CONTACT WITH THE CHIEF DEPUTY DIRECTOR IN THE DEPARTMENT.

THE COURT: AND IS MR. LUCKE SOMEWHAT OF A SUPERIOR TO YOU?

THE WITNESS: YES, HE IS.

THE COURT: THANK YOU.

BY MR. LIPPE:

Q. I'M SORRY, YOU SAID MR. LUCKE SAID HE WAS THAT CONTACT WITH SOMEONE ELSE IN THE DEPARTMENT?

A. OUR CHIEF DEPUTY DIRECTOR, MR. JIM BURROUGHS.

Q. OKAY, AND WHAT WERE THE INSTRUCTIONS THAT MR. LUCKE TRANSMITTED TO YOU?

A. WE'VE BEEN INSTRUCTED THAT WE ARE TO MAKE A DAILY INSPECTION OF THE AREA OF THE SUBJECT EXEMPTION UNTIL FURTHER NOTICE.

Q. OKAY. WERE ANY PARAMETERS PUTS ON THE, "UNTIL FURTHER NOTICE" PART OF THAT, A WEEK, TWO WEEKS, OR ANYTHING?

A. THERE WAS NO QUALIFIER BEYOND "UNTIL FURTHER NOTICE."

Q. OKAY, AND WERE YOU INVOLVED IN THE DECISION TO ISSUE A NOTICE OF VIOLATION TO PACIFIC LUMBER ON OCTOBER 9TH?

A. YES, I WAS.

Q. OKAY, AND IN YOUR OPINION, WHAT WAS THE SUBSTANCE OF THE VIOLATION THAT THAT NOTICE PERTAINS TO?

A. WE DISCUSSED WITH MR. KEN MOORE WHEN HE CAME BACK FROM A [P. 92] SITE VISIT – AND WHEN I SAY, "WE," THAT MEANS MR. SCANLON AND MYSELF AND MR. MOORE – ABOUT WHAT HE HAD SEEN IN THE WAY OF SOME SMALL TREES THAT HAD BEEN KNOCKED DOWN IN CONNECTION WITH REMOVING A LARGE LOG. WE DISCUSSED WHETHER, IN HIS BIOLOGICAL OPINION, THAT WOULD BE A VIOLATION OF 1038(B)(7). HE INDICATED HE THOUGH IT WAS.

Q. OKAY.

THE COURT: NOW, MR. MOORE, HE IS A SUBORDINATE TO YOU.

THE WITNESS: I'M NOT SURE HOW DFG IS STAFFED, YOUR HONOR.

THE COURT: OH, I SEE. BUT IN ANY SENSE, DOES HE SOMETIMES REPORT TO YOU, AS YOUR AGENCIES WORK TOGETHER? HOW DOES THAT WORK?

THE WITNESS: NO, HE WOULD REPORT TO HIS DIRECT LINE SUPERVISOR IN THE DFG HIERARCHY.

THE COURT: OKAY, AND WOULD THAT THEN COME OVER - YOU'D LEARN IT THROUGH THAT SAME -

THE WITNESS: WE COMMUNICATE AT VARIOUS LEVELS. I WOULD BE MORE LIKELY PROBABLY TO BE ON A PAR WITH MR. MARK STOPHER, WHO'S HERE.

THE COURT: OH, ALL RIGHT. OKAY. THANK YOU.

BY MR. LIPPE:

Q. WERE YOU INVOLVED IN THE DECISION TO WITHDRAW THE MISDEMEANOR PROSECUTION AGAINST PACIFIC LUMBER ON THE NOTICE [P. 93] OF VIOLATION?

A. I WAS INVOLVED IN THE DISCUSSION.

Q. WHAT WAS THE REASON FOR DOING THAT?

A. AFTER FURTHER DISCUSSION WITH PERSONS IN THE DEPARTMENT, IT WAS DETERMINED THAT AFTER THE STOP ORDER WHICH WAS ALSO ISSUED AS PART OF WHAT HE HAD SEEN THERE, AND AFTER THE MEETING WE HAD THE NEXT DAY TO MAKE SURE THAT WE ALL HAD A COMMON UNDERSTANDING OF WHAT COULD OR COULD NOT

BE DONE AND WHERE IT COULD OR COULD NOT BE DONE; WE DECIDED THAT IT WAS NOT WORTH PURSUING AS A MISDEMEANOR PROSECUTION.

Q. OKAY. SO NO DECISION WAS MADE THAT, IN FACT, NO VIOLATION HAD OCCURRED; IS THAT CORRECT?

A. THAT'S CORRECT. WE STILL BELIEVE THAT A VIOLATION DID OCCUR.

Q. AND I TAKE IT FROM YOUR TESTIMONY THAT YOU ARE OF THE OPINION THAT PACIFIC LUMBER IS NOT GOING TO DO IT AGAIN. IS THAT WHAT YOU MEAN BY "IT'S NOT WORTH PURSUING"?

A. WE BELIEVE THAT IN THE INTERESTS OF JUSTICE, IT WOULD BE DIFFICULT TO PROVE, AND IN A DIFFERENT CONTEXT, IN ANOTHER LOCATION, IT WOULD NOT HAVE BEEN THE KIND OF THING THAT WE WOULD HAVE WRITTEN A CITATION FOR.

Q. NOW, HOW LONG DO YOU HAVE THE RESOURCES TO CARRY OUT THE INSTRUCTIONS GIVEN TO YOU BY MR. LUCKE, DAILY INSPECTIONS? CAN YOU DO THAT INDEFINITELY?

A. IF THAT'S WHAT CONTINUED TO BE OUR DIRECTION, WE WILL

APPENDIX Q

[p. 1] PAGES 1-68

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
LOUIS C. BECHTLE, JUDGE

MARBLED MURRELET, ET AL., PLAINTIFFS, V. BRUCE BABBITT, ET AL., DEFENDANTS.	C 95-3261 LCB SAN FRANCISCO, CALIFORNIA THURSDAY, FEBRUARY 26, 1998 COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFFS: LAW OFFICES OF THOMAS LIPPE
ONE MARKET PLAZA,
STEUART TOWER
SAN FRANCISCO, CA 94105

BY: THOMAS N. LIPPE, ESQ.

LAW OFFICES OF
SHARON E. DUGGAN
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SAN FRANCISCO, CA 94122

BY: SHARON E. DUGGAN, ESQ.

APPEARANCES CONT'D (NEXT PAGE):

REPORTED BY: ROSITA FLORES, CSR, RPR
1301 CLAY STREET,
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COMPUTERIZED TRANSCRIPTION BY ECLIPSE

[p. 2] FOR THE DEFENDANTS:

PILLSBURY, MADISON
& SUTRO
225 BUSH STREET
SAN FRANCISCO, CA 94104

BY: ALSON R. KEMP JR,
ESQ.

RAWLES, HINKLE, CARTER
BEHNKE & OGLESBY
169 MADISON STREET,
SUITE 300
UKIAH, CA 95482

BY: JARED G. CARTER, ESQ.
FRANK SHAW BACIK,
ESQ.

* * *

[p. 11] MR. CARTER: BY THROWING OUT THE CASE, YOU DON'T HAVE AN INTERPRETATION AND AN APPLICATION OF THE UNDERLYING STATUTE. IT'S NORMATIVE PROVISIONS. YOU DON'T REACH THAT ISSUE. AND SO IT WOULD BE AN INCORRECT APPLICATION OF THE *RAZORE* CASE TO SAY IT WOULD APPLY TO DETERMINE WHETHER OR NOT A PREVAILING DEFENDANT IS ENTITLED TO FEES IF WE GET TO THE MERITS, WE HAVE BIG A TRIAL, AND THE DEFENDANT WINS, WITH THE [p.

12] ARTICULATION OF A STANDARD THAT FURTHERS THE PURPOSES OF THE ACT. NOTHING IN *RAZORE* INVOLVES, IMPLICATES THAT ISSUE IN ANYWAY.

AND SO OUR POSITION IS THAT IT IS CORRECTLY DECIDED, BECAUSE THE DEFENDANT IN THAT CASE CERTAINLY DIDN'T CONTRIBUTE TO THE APPLICATION OF THE ACT IN A MANNER TO CARRY OUT ITS PURPOSES, BUT THAT IT IS INCORRECTLY ARTICULATED. OR IF IT IS CORRECTLY ARTICULATED, IT APPLIES TO A VERY LIMITED KIND OF AN ISSUE. IT APPLIES TO THE KIND OF AN ISSUE THAT IS INVOLVED IN OUR SECTION 9 PART OF THIS CASE, YOUR HONOR. WE ARE NOT URGING YOU TO GRANT US FEES UNDER SECTION 9 ON THE THEORY THAT OUR PARTICIPATION IN OUR LITIGATION IN SECTION 9 CONTRIBUTED SUBSTANTIALLY TO THE PURPOSES OF THE ACT. THEY DIDN'T, BUT WE ARE ASKING FOR FEES ON THAT COUNT BECAUSE IT WAS UNREASONABLE FOR THE PLAINTIFF TO PURSUE THAT, MAYBE NOT UNREASONABLE TO FILE IT. WE CERTAINLY DON'T THINK WE MET THE RULE 11 STANDARDS, AND YOU TOLD US WE DIDN'T WHEN WE ASKED FOR A RULE 11 UNDER RULE 11 FOR FEES AND COSTS DURING THE COURSE OF THE CASE, BUT THAT CLAIM WAS PURSUED FAR TOO LONG AFTER IT BECAME CLEAR THAT THERE WAS NO MERIT TO IT. AND SO THE RULE WE ARE ARGUING THAT THE COURT SHOULD APPLY IS THAT, FOR THOSE PARTS OF A CASE WHERE THERE IS AN ACTUAL LITIGATION OVER THE MEANING AND APPLICATION OF THE SUBSTANTIVE PROVISIONS OF

THE STATUTE, THEN THE "WHEN APPROPRIATE" STANDARD APPLIES AS ARTICULATED BY MANY, MANY CASES, PARTICULARLY CARSON-TRUCKEE, THAT THE

* * *

CERTIFICATE OF REPORTER

I, ROSITA FLORES, OFFICIAL UNDERSIGNED COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPTION OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

/s/ Rosita Flores
ROSITA FLORES